

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Review of the Commission's)
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

MM Docket No. 92-51

To: The Commission

RECEIVED

JUN 12 1992

COMMENTS
OF
ML MEDIA PARTNERS, L.P.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ML Media Partners, L.P. ("ML Media"), by its attorneys, submits herewith the following comments in response to the Commission's Notice of Proposed Rule Making and Notice of Inquiry ("NPRM") released in the above-captioned matter on April 1, 1992. Although the NPRM seeks comment on several different issues, ML Media will focus on the proposed change in the attribution criteria relevant to interests of limited partners in widely-held limited partnerships.

As set forth more fully below, ML Media strongly supports the Commission's preliminary decision to modify its insulation criteria to eliminate the current conflict with federal and state securities laws in a way that will allow limited partner investors in widely-held limited partnerships to hold non-attributable interests, notwithstanding their ability to vote on the election or removal of the general partners. Moreover, ML Media respectfully submits that the revised insulation criteria should apply to all widely-held limited partnerships, not just

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those which may be subject to regulation as so-called "business development companies."

I. STATEMENT OF INTEREST

ML Media is a widely-held public limited partnership formed specifically for the purpose of making media investments.¹ ML Media has more than 17,000 limited partners, none of which hold as much as one percent (1%) of the total limited partnership interest. Further, the role of its limited partners is highly restricted, and none have the right to be involved in any of the partnership's media activities.

ML Media's interest in the subject proceeding primarily involves the extent to which the interests of limited partners should be considered "cognizable" for purposes of applying the Commission's multiple ownership rules. Under the Commission's current rules, limited partners are attributed with an interest in a partnership's media investments unless they are able to demonstrate that they are sufficiently insulated from "material involvement" in the management or operation of the partnership's media-related activities. See, e.g., NPRM at ¶ 12. The Commission has set forth specific criteria which, if met, presumptively indicate that the limited partner is sufficiently

¹ ML Media, as Commission records will reflect, is a public limited partnership that, since 1986, has owned and controlled various broadcast stations and cable television interests. It is also affiliated with ML Media Opportunity Partners, L.P., a separate public limited partnership which similarly owns various media properties.

insulated. See 47 CFR § 73.3555, Note 2(g)(2). Among the criteria is a requirement that the limited partners not be permitted to vote on the election and removal of general partners, except in restricted circumstances. Id.

ML Media's limited partnership interests were offered by prospectus in states which require limited partners to have the ability to vote on the election and/or removal of general partners. As a result, ML Media has, over the years, been unable to give the unqualified certification that its limited partners are sufficiently insulated to be entitled to non-attribution status despite the fact that none of its more than 17,000 limited partners has any involvement in the day-to-day affairs of the partnership. Thus, ML Media has been forced to obtain a series of ad hoc application decisions enabling it to treat its limited partners as exempt from attribution.² These decisions generally were based upon ML Media's ability to make an overall showing of no material involvement of its limited partners.

II. THE COMMISSION'S PROPOSAL

In the subject proceeding, the Commission, among other things, is considering whether it should alter its insulation criteria with respect to widely-held limited partnerships. NPRM at ¶¶ 16-17. As noted, such entities are often unable to comply with the Commission's existing insulation criteria because of

² See, e.g., Application for Consent to Assignment of License of KATC(TV), Lafayette, Louisiana (FCC File No. BALCT-860924KK).

federal and/or state securities laws that require that limited partners have the ability to vote on the election and removal of general partners. Id. As a result, the limited partners of these partnerships are presumptively attributed with an interest in the partnership's media investments. Similarly, the limited partners are considered parties to any partnership application, and any media interests or litigation matters involving the limited partners must be considered before completing the application -- a daunting task indeed for entities, such as ML Media, with thousands of limited partners.

The Commission now proposes to modify its criteria as they apply to "business development companies" organized as widely-held limited partnerships, because it has recognized that "the strict application of [its] current attribution criteria . . . may impede the ability of these limited partnerships to make capital investments in broadcast entities and to attract a large pool of limited partners." NPRM at ¶ 16.³ The Commission also seeks comment on "whether [its] attribution criteria for all widely-held limited partnerships should be modified to recognize insulation where limited partners hold an insignificant percentage of the total equity in the partnership." Id. at ¶ 17 (emphasis added).

³ Business development companies are governed by the Investment Company Act of 1940, 15 USC §§ 80(a) et seq. (the "Investment Act"), as well as state and federal securities laws.

III. ARGUMENT

A. The Commission Should Revise Its Attribution Criteria To Allow Limited Partners To Vote on the Election or Removal of General Partners

ML Media supports the Commission's preliminary decision to modify its insulation criteria. As the Commission has recognized, where the involvement of limited partners is restricted to voting on the election or removal of general partners, an individual limited partner is simply unable to exert control over the partnership's media holdings -- at least until such time as the individual's vote reaches a level which the Commission deems significant. Id. at ¶ 15. The role of limited partners in this regard is essentially the equivalent to the right of shareholders in a corporation to vote for directors. Accordingly, ML Media respectfully submits that, to the extent a limited partner's share of the vote is less than the level which would trigger the attribution of a corporate shareholder, the holding of the limited partner should be deemed non-attributable.⁴

⁴ Currently, the attribution threshold for corporate shareholders is five percent (5%) of the corporation's voting stock. 47 CFR § 73.3555, Note 2(a). Thus, to the extent a limited partner is otherwise in compliance with the current insulation criteria, the non-attributable status of the investment should remain so long as the limited partner is able to cast less than five percent (5%) of the vote for the election or removal of the general partner. The Commission is proposing to raise the corporate threshold to ten percent (10%). See NPRM at ¶ 9. ML Media supports this proposal and believes that any new benchmark should likewise govern the changes discussed herein relative to attribution of limited partnership interests.

The Commission, of course, previously chose not to apply the corporate five percent attribution threshold to limited partnerships on an across-the-board basis. Multiple Ownership Rules (Ownership Attribution Reconsideration), 61 RR2d 739, 746 (1986) ("Recon. Order"). In doing so, it expressed a concern that the flexibility of limited partnership agreements could be used to undermine the policies of its multiple ownership provisions. Id.

What is proposed here, however, is a much more modest step. The highly restricted and specially-targeted voting rights recognized here will hardly result in limited partners becoming materially involved in the affairs of the partnership. First, it is proposed that the Commission retain the other existing insulation criteria, which restrict the ability of limited partners to become actively involved in the day-to-day operations of the partnership's media investments.⁵ Second, the widely-held nature of the limited partnerships involved make it inconceivable that the limited partners could somehow use their voting rights to band together to exercise control over the general partners.

⁵ See, e.g., Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985); as modified on reconsideration, Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986).

B. There Is No Basis for Distinguishing Business Development Companies From Other Limited Partnerships

The Commission also has requested comment on the types of partnerships to which any revised criteria should apply, but has indicated that, at a minimum, they should be applied to business development companies organized as limited partnerships. NPRM at ¶¶ 16-17.

ML Media submits that, for purposes of applying the revised insulation criteria proposed above, there is no reason to distinguish business development companies organized as limited partnerships from other widely-held limited partnerships. The Commission previously has determined that the non-attribution of a particular limited partner is dependent on a demonstration of "no material involvement" in the management or operation of the partnership. Recon. Order, 61 RR 2d at 742. Although subject to the Investment Act, there is nothing inherent in the regulation of a business development company that results in its limited partners being further insulated from material involvement in the affairs of the limited partnership -- the central concept underlying the Commission's insulation criteria -- than limited partners in other widely-held limited partnerships.

Rather, the key similarity between business development companies and other widely-held limited partnerships for purposes of the multiple ownership rules is that both are publicly-offered entities with many individual investor partners, each generally holding only a fraction of the partnership's total equity

interest. As such, the likelihood of the limited partners using their collective voting power to influence the operation of the partnership's media properties is virtually non-existent.

Further, both types of entities are organized, at least in part, for the purpose of making investments in media properties and are structured as limited partnerships to obtain certain tax advantages. Because both must, pursuant to state or federal securities regulations, provide limited partners with voting rights in excess of those permitted by the Commission, they are limited in their ability to assure potential investors that an investment in the partnership will not ultimately result in the attribution of the partnership's media holdings. Since individual investment decisions normally must be made before the partnership makes any particular media investment, an ad hoc Commission decision made at the time of a particular acquisition simply comes too late in the investment process. Thus, there is an inherent difficulty in attracting qualified investors -- for both types of limited partnerships. An easily applied rule, of the type espoused here, would go a long way toward achieving certainty and will allow investors to make reasoned investment decisions in a timely manner.

The Commission further seeks comment on the standards, if any, which should be used to define "widely-held" limited partnerships eligible for the revised criteria. NPRM at ¶ 17. ML Media believes that there are a variety of distinctions that the Commission could reasonably choose as a basis for applying

the new criteria. At a minimum, however, the revised criteria should apply to any partnership which must provide limited partners with voting rights in order to comply with federal or state securities laws. As detailed above, such entities generally are publicly offered and subject to stringent regulation by federal and/or state enforcement agencies. The alternative use of a fixed minimum number of investors as a determining factor for eligibility seems somewhat arbitrary, particularly when compared with application of the corporate benchmark, which is unrelated to the number of other voting stockholders.⁶ Given the generally flexible nature of limited partnership agreements, however, using situations in which federal or state laws require that voting rights be given to limited partners seems a reasonable minimum requirement for eligibility. Those partnerships not required to provide voting

⁶ Moreover, ML Media respectfully submits that the new criteria could be applied to any limited partnership, regardless of its size or whether it is required by state or federal regulations to provide voting rights to limited partners. The threshold voting level, coupled with the other criteria designed to prevent active, day-to-day involvement, should provide sufficient comfort that the limited partners are not materially involved. As the Commission has recognized in the corporate context, the mere ability to vote does not result in an ability to control until a threshold level has been achieved. Thus, by applying a five or ten percent voting threshold in conjunction with the other existing insulation criteria, the Commission can ensure that insulated limited partners will not be materially involved in the day-to-day affairs of the limited partnership.

rights to limited partners could still structure their partnership agreements to conform to the current criteria.⁷

IV. CONCLUSION

Accordingly, for the foregoing reasons, ML Media respectfully submits that the Commission should allow limited partners to vote on the election and removal of general partners without losing their non-attributable status.

Respectfully submitted,

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June 12, 1992

⁷ To the extent necessary, it should be noted that the proposals espoused herein are intended to be in addition to the current insulation criteria. Thus, a limited partner without voting rights and conforming to all current insulation criteria should be able to maintain non-attribution status, notwithstanding the size of its equity interest.